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IN THE

Supreme Court of the United States

October Term, 1968.

No. 810

~~In re: ESTATE OF IDA MYERS HARRIS~~.

HARRY CONRAD MYERS and CHLOE MYERS individually and as parents and natural guardians for CATHARINE ANNE MYERS, and ROBERT A. KOLB and FRANCIS A. WECKENMAN as executors and trustees of the will of IDA MYERS HARRIS, Deceased,

V. *Petitioners*

ABEL K. HARRIS

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Harry Conrad Myers and Chloe Myers individually and as parents and natural guardians for Catharine Anne Myers, and Robert A. Kolb and Francis A. Weckenman as executors and trustees of the will of Ida Myers Harris, Deceased, hereby petition for a writ of certiorari to review the decision of the Supreme Court of the Commonwealth of Pennsylvania holding that an antenuptial agreement between decedent and Abel K. Harris was invalid despite a finding by the trial court that the estate has clearly established that the antenuptial agreement was fair, equitable, and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death.

OPINIONS BELOW.

The opinion below, which notes that the petition for reargument was refused on September 11, 1968, is reported in 431 Pa. 293, 245 A. 2d 647. It is appended hereto as Appendix A. Appendix B consists of the opinion of the Orphans' Court of Montgomery County, Commonwealth of Pennsylvania, by Taxis, P. J.

JURISDICTION.

The order sought to be reviewed was made and entered on August 6, 1968. An order denying a timely motion for reargument was made and entered on September 11, 1968. (Both orders appear only in the opinion.) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether a person's right to a hearing under the due process clause of the Fourteenth Amendment to the United States Constitution has not been violated by a state which deprives such person the right to have the finder of facts judge the credibility of witnesses?

II. Whether a person's right to the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution has not been violated by a state which holds that oral testimony offered by plaintiff was proof which shifted the burden of proof to defendant (decedent's estate)?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment XIV, United States Constitution, Section 1, Clauses 2 and 3: "* * * nor shall any State deprive any person of * * * property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This was an action to strike off the election of a surviving husband (Abel K. Harris) to take against the will of his deceased wife, which involved the validity of an antenuptial agreement signed by him and decedent 18 days before their marriage on May 9, 1959 (6a-24a). He was 76 years of age, and she was 66 years of age. Each had an adult child from a prior marriage. The agreement recited that the nature and extent of the property of each party had been disclosed to the other. Each renounced their respective interest in the estate of the other. There was no provision in the agreement in favor of the wife or the husband (9a-11a). She died on September 20, 1966 (6a).

Mr. Harris had been represented by one Malcolm Campbell, Esq., for sometime prior to the preparation and signing of the antenuptial agreement. Mr. Campbell represented both parties in the preparation and execution of that agreement (51a-59a). Decedent was not separately represented either in the drafting or signing of the agreement (65a).

On October 20, 1966, 30 days after the death of decedent, Mr. Campbell entered into a contingent fee agreement with Mr. Harris aimed at setting aside the antenuptial agreement, for which Mr. Harris would pay Mr. Campbell one-third of any amount recovered (99a-100a).

On October 21, 1966, Mr. Campbell on behalf of Mr. Harris filed a Notice of Election to take against both the will of decedent dated August 8, 1966, and that of June 5, 1959 (1a, 4a-5a).

On January 4, 1967, the estate filed a Petition for Citation on Mr. Harris to show cause why his election to take against the wills and conveyances of decedent should not be vacated and declared void and stricken off (6a-23a). Mr. Campbell filed an answer on behalf of Mr. Harris on January 20, 1967 (25a-26a).

On February 10, 1967, Mr. Campbell withdrew his appearance as attorney for Mr. Harris (2a).

The matter on February 16, 1967 proceeded to trial before Taxis, P. J. (without a jury), at which time Walter Phipps, Jr., Esq., appeared for Mr. Harris (27a-117a). He called as his principal witness Malcolm Campbell, Esq., who testified over the objections of counsel for the petitioners (48a-71a, 53a, 57a, 58a and 70a).

Mr. Campbell over the objection of counsel for petitioners testified that at the signing of the antenuptial agreement, Mr. Harris stated his total assets were $20,000 and testatrix stated her assets were about twice that (58a).

At the date of the agreement, decedent's securities and cash totalled $101,182 and she owned a farmhouse and barn on 5.857 acres and at the date of her death her assets were estimated at $175,000 (28a-29a).

The trial court did not believe Mr. Campbell. The trial court as finder of the fact found "that the estate has clearly established that the antenuptial agreement was fair, equitable and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death. Therefore, the court concludes that it operates as a bar to the husband's right to elect to take against the will * * *."

On appeal by Abel K. Harris to the Supreme Court of Pennsylvania, although it did not hear nor see the witnesses, nor was it the finder of fact, it nonetheless substituted its finding for that of the trial court:

> "Campbell further testified that on April 21 he again advised the parties of the importance of disclosure by each of them, and again questioned both of them concerning their assets. Appellant stated that his

total assets amounted to $20,000 and his intended wife then responded that she was worth 'about twice that much.' This was a gross falsehood. Appellant's assets were as he represented, but deceased had property on April 21, 1959 totalling $137,182, and she knew that her securities at that time were worth $87,000. The antenuptial agreement was then executed.

"When a claimant has proved that material misrepresentations were made it is presumed that the contract was entered into in reliance upon these misrepresentations and the burden to prove otherwise is upon the decedent's estate * * *. This burden the estate of the decedent failed to meet. In view of the misrepresentations of her wealth by the decedent, claimant husband could elect to take against his wife's will." Harris Estate, 431 Pa. 293, 298-9; 245 A. 2d 647, 650.

REASONS FOR GRANTING THE WRIT.

POINT I.

Where an Appellate Court, Which Has Not Seen Nor Heard the Witnesses, Substitutes Its Findings of Fact for Those of the Trial Court, Petitioners Have Been Deprived of Their Right to a Hearing Under the Due Process Clause of the Fourteenth Amendment.

The validity of the antenuptial agreement between Abel K. Harris and decedent (Ida C. Harris) was tried before the trial court without a jury.

At the conclusion of the trial, the trial judge sitting as the finder of fact found "after careful consideration of the foregoing and of all the other evidence presented and the able arguments of counsel, the court finds that the estate has clearly established that the ante-nuptial agreement was fair, equitable, and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death . . ."

On appeal by Abel K. Harris to the Supreme Court of Pennsylvania it confused testimony with proof and held that the oral testimony of a witness was proof of alleged misrepresentations by decedent of her worth, and then proceeded to hold that the burden was then on the decedent's estate to prove otherwise. *Harris Estate,* 431 Pa. 293, 298-99, 245 A. 2d 647, 650.

Such a holding completely nullifies the function and jurisdiction of a trier of the facts. In fact it has deprived petitioners of a hearing in violation of the mandate of the Fourteenth Amendment. "The federal guaranty of due process extends to state action through its judicial as well

as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 680, *Shelley v. Kraemer,* 334 U. S. 1, 18.

A hearing must be a real one, not a sham, or a pretense. *Moore v. Dempsey,* 261 U. S. 86, 91, *Palko v. Connecticut,* 302 U. S. 319, 327. When as in the case at bar, the appellate court has nullified the function and province of the trier of the facts, there has in fact been no hearing as required by the due process and equal protection clauses: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Sec. 1, Fourteenth Amendment.

"Due process" includes and means an opportunity to be heard and a resultant action in conformity with the truth deduced at such hearing. *In re American Rio Grande Land & Irr. Co.,* 21 F. 492.

POINT II.

The Holding That Oral Testimony Offered by Plaintiff Was Proof Which Shifted the Burden of Proof to Decedent's Estate Conflicts With the Equal Protection of the Laws Clause of the Fourteenth Amendment.

Where surviving husband alleges decedent misrepresented her worth at the signing of an antenuptial agreement, the burden of proof is on the husband and does not shift to decedent's estate after oral testimony of witness. The appellate court in holding to the contrary (*Harris Estate,* 431 Pa. 293, 298-99, 245 A. 2d 650) has deprived petitioners of their property without due process: the right to have the trier of facts (the trial court) to judge the credibility of witnesses. The court must not substitute its judgment as to credibility of witnesses in place of the trier

of facts determination. *Renault v. L. N. Renault & Sons,* 188 F. 2d 317. The credibility of witnesses is not for the court but for the trier of facts. *Sieracinski v. E. I. DuPont de Nemours & Co.,* 118 F. 2d 531. "The Pennsylvania rule is that oral testimony, even though it may be uncontradicted is for the (finder of facts)." *Kawietzke v. Rarich,* 198 F. Supp. 841 (1961).

"The question of the credibility of the witnesses was solely for the hearing judge who saw and heard them and who evaluated the testimony as a whole." *Collings Estate,* 405 Pa. 280, 282. "It is established beyond argument that the findings of fact of the auditing judge, sitting as a chancellor, which are based on competent and adequate evidence are controlling in this appellate review: *Snyder Estate,* 368 Pa. 393, 84 A. 2d 318." *Pavlinko Estate,* 399 Pa. 536. To the same effect is *Hanna Estate,* 383 Pa. 196, 199, and the many cases cited therein. In *Gelb Estate,* 425 Pa. 117, at 125 the above cases were cited with approval.

In *Zeedick Will,* 421 Pa. 45, 46 it was clearly stated that "we also note that on appeal, *it is not within our province to assess the credibility of the testimony.** Our scope of review is limited to a determination of whether or not the findings of fact are supported by sufficient, competent evidence, and whether or not the court below committed an error of law or abused its discretion: *Abrams Will,* 419 Pa. 92, 213 A. 2d 638."

Where oral testimony is concerned it is for the finder of facts to pass upon the credibility of witnesses, even though uncontradicted by defendant witnesses or even though the defendant introduces no testimony at all. *Dorn v. Leibowitz,* 387 Pa. 335, 127 A. 2d 734.

It was for the trial judge sitting without a jury to judge the credibility of Malcolm Campbell, not the appellate court.

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* Italics supplied.

The burden of proof during the trial did not shift:

The *burden of proof*—the risk of non-persuasion of the trier of facts—*never shifts,* since no fixed rule of law can be said to shift. *Wigmore on Evidence,* (3rd Ed.) Vol. 9, sec. 2489, pp. 285-86.

The burden of going forward may shift during a trial, however this does not mean that if a party produces no evidence or no additional evidence, the finder of facts must find for the opponent. Id. p. 286. The finder of facts (the trial judge) was not compelled to believe Malcolm Campbell. In fact he did not as his finding so clearly states: "the court finds that the estate has clearly established that the antenuptial agreement was fair, equitable, and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death" (121a).

"The result of all the decisions upon the question is that the (husband's) 'prima facie' showing merely carries the case to the (finder of facts), and upon it alone (the finder of facts) *may* decide for him; but (the finder of facts) is not compelled to do so, and whether there is evidence on both sides, or only on the (husband's), the latter has the burden of proving (the alleged misrepresentations) . . . The burden to prove his case is *always* on the plaintiff, whether the defendant introduces evidence or not . . ." *Page v. Camp Mfg. Co.,* 180 N. C. 330, 104 S. E. 667, Wigmore on Evidence, Vol. 9, p. 286.

It is therefore submitted that the Supreme Court of Pennsylvania in holding that Mr. Campbell's oral testimony was proof of material misrepresentations, contrary to the findings of the trier of facts, and that the burden of

proving that the husband did not rely thereon was upon the decedent's estate, is fundamental error which deprived decedent's estate not only of its property without the due process of law but also of the equal protection of the laws guaranteed by the Fourteenth Amendment.

CONCLUSION.

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

ROLAND J. CHRISTY,
110 Windsor Avenue,
Melrose Park, Pa. 19126,
Attorney for Petitioners.

CERTIFICATE OF SERVICE.

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania was served this 6th day of December, 1968, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to Walter Phipps, Jr., Esq., attorney for Abel K. Harris, 312 Fayette Street, Conshohocken, Pennsylvania.

Roland J. Christy

ROLAND J. CHRISTY.

APPENDIX A.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 103 JANUARY TERM, 1968.

IN RE: ESTATE OF IDA MYERS HARRIS

APPEAL OF ABEL K. HARRIS

APPEAL FROM THE ORDER OF THE ORPHANS' COURT OF MONTGOMERY COUNTY AS OF No. 67,530.

OPINION OF THE COURT.

BELL, *C. J.* Filed: August 6, 1968

Rehearing denied Sept. 11, 1968

On April 21, 1959, the deceased and her husband, who is the present appellant, went to see Malcolm Campbell, Esq., for the purpose of entering into a written antenuptial agreement. This was eighteen days prior to their intended marriage. At that time appellant was 76 years of age and the deceased 66, each having an adult child by a former marriage. They executed an antenuptial agreement which was prepared by Campbell. This agreement provides:

"AGREEMENT made this 21st day of April, A. D. 1959 between ABEL K. HARRIS and IDA C. MYERS, both of Montgomery County, Pennsylvania:

"WHEREAS ABEL K. HARRIS and IDA C. MYERS [parties] to this agreement intend to be married in the immediate future, and

"WHEREAS each of the parties owns individually real and personal property, *the nature and extent of the holdings of each party having been disclosed to the other,** and

"WHEREAS the parties desire that all property now owned or hereafter acquired by each of them shall, for testamentary disposition and intestate distribution, be free of any claim or distributive share of the other that may arise by reason of their contemplated marriage,

"NOW, THEREFORE, in consideration of the contemplated marriage of the mutual promises hereinafter made, and intending to be legally bound under the Uniform Obligations Act of the Commonwealth of Pennsylvania,

"IT IS AGREED THAT:

". . .

"2. Each of the parties waives and releases any rights as surviving spouse to elect to take against the other's will, whether heretofore or hereafter made, and each of the parties waives and releases any rights as surviving spouse to participate in any intestate share that he or she otherwise might become entitled due to a full or partial intestacy under the laws of the Commonwealth of Pennsylvania or similar laws of any other jurisdiction which may be applicable.

"3. This agreement shall not be construed as releasing any claim or right which either of the parties might have against the estate of the other due to testamentary clauses now or hereafter that might be made for the surviving spouse.

". . .

"7. The foregoing agreement contains the entire agreement and there are no other understandings or agreements,

* Italics throughout, ours.

either written or oral, between them concerning the aforesaid.

"IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

"/s/ ABEL K. HARRIS,
/s/ IDA C. MYERS,

"Signed, sealed and delivered
in the presence of:

/s/ MALCOLM CAMPBELL,
/s/ SARA D. HERITAGE."

There was no financial provision in this antenuptial agreement for either party,* nor did the deceased wife leave her husband anything in her will. The parties lived together in harmony from their marriage on May 9, 1959 until the wife's death on September 22, 1966.

On October 21, 1966, appellant filed an election to take against his wife's will, in spite of his covenant not to do so. Upon a petition to show cause why the election should not be vacated, the Orphans' Court, after a hearing, struck off the election, because of the above-recited antenuptial agreement. From the Order of the Orphans' Court, the husband took this appeal.

The law with respect to antenuptial agreements has been so recently reviewed and restated in *Hillegass Estate,*

* It is the belief of the writer of this Opinion that nearly every claimant who has entered into an antenuptial agreement labors under the delusion that in this sordid, money-mad world in which we are living, nobody marries for anything except money, and an agreement reciting full disclosure of an intended spouse's wealth and a complete release by the intended spouse is merely a scrap of paper. Contrary to such belief, love is not obsolete, especially among the young. Parties to an antenuptial agreement and release seem to forget that the elderly marry, in most cases, for comfort and companionship and affection (and occasionally for love), instead of solely for financial gain.

431 Pa. 144, 244 A. 2d 67, that it will suffice if we merely restate that part which is most *pertinent* to this case. The antenuptial agreement is presumptively valid and binding upon both parties, and since the surviving husband contended that he entered into the agreement because of misrepresentations of her property by his intended wife, the burden to prove material non disclosure and thus overcome the presumption of validity and full and fair disclosure was upon the surviving husband.

Prior to the *April 21, 1959* antenuptial agreement, deceased had consulted her then counsel, Roland J. Christy, and he prepared for her an antenuptial agreement to which was appended a schedule of her assets, which included $87,000 in securities. This antenuptial agreement was never executed, but a copy of it, *without the schedule attached,* was taken by the deceased to the April 21, 1959 meeting with her intended husband at Campbell's office. The antenuptial agreement which the parties executed on April 21, 1959 is substantially identical with that drawn for the deceased by her counsel, Roland J. Christy, except that a provision in the Christy-drawn agreement providing for waiver of the defense of non-disclosure was omitted from the agreement executed by the parties.

Appellant-husband was represented at the April 21, 1959 meeting by Campbell, although he did not represent appellant in these proceedings. Campbell was permitted to testify as to exactly what happened at the two meetings which the parties held at his office, the latter being the meeting on April 21, 1959, when the antenuptial agreement was executed. Appellee contends, based on the Dead Man's Act, P. L. 158 (1887), 28 P. S. § 322, that Campbell was not a competent witness. There is no merit in this contention; the authorities hold that the scrivener of an antenuptial agreement is permitted to testify for or against the estate as to transactions which occurred with the decedent unless

the scrivener's interest, as distinguished from his testimony, is adverse to the decedent's estate: *Gelb Estate,* 425 Pa. 117, 228 A. 2d 367. See also, *Commonwealth Trust Co. v. Szabo,* 391 Pa. 272, 281-282, 138 A. 2d 85, 89; *Gaston Estate,* 361 Pa. 105, 62 A. 2d 904; *Dillon's Estate,* 269 Pa. 234, 111 Atl. 919. Attorney Campbell's evidence, therefore, was admissible on the subject of disclosure and everything else that occurred at these meetings.

Campbell testified that at the earlier meeting the deceased, unaccompanied by counsel, would not respond to his questions concerning her worth. Appellant on that occasion stated that he "had a house plus $7,000 or $8,000 in a savings account." Campbell testified that he impressed upon the deceased the importance of a full disclosure of her property and suggested that she bring a schedule of her assets with her to the April 21st meeting.

Campbell further testified that on April 21 he again advised the parties of the importance of disclosure by each of them, and again questioned both of them concerning their assets. Appellant stated that his total assets amounted to $20,000, and his intended wife then responded that she was worth "about twice that much." This was a gross falsehood. Appellant's assets were as he represented, but deceased had property on April 21, 1959 totaling $137,182, and she knew that her securities at that time were worth $87,000.* The antenuptial agreement was then executed.

When a claimant has proved that material misrepresentations were made it is presumed that the contract was entered into in reliance upon these misrepresentations, and the burden to prove otherwise is upon the decedent's estate: *Hillegass Estate,* 413 Pa., *supra; Gelb Estate,* 425 Pa., *supra;*

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* We further note, although it is of no importance in this case, that (1) appellant had access to joint tax returns and other information which would have revealed his wife's worth, and (2) throughout their married life Campbell served as counsel for both spouses.

McClellan Estate, 365 Pa. 401, 75 A. 2d 595. This burden the estate of the decedent failed to meet. In view of the misrepresentations of her wealth by the decedent, claimant husband could elect to take against his wife's will.

Order reversed, costs to be paid by the Estate of Ida Myers Harris.

Mr. Justice COHEN concurs in the result.

APPENDIX B.

IN THE

ORPHANS' COURT OF MONTGOMERY COUNTY

No. 67530

ESTATE OF IDA MYERS HARRIS, DECEASED.

OPINION SUR PETITION TO STRIKE ELECTION OF SURVIVING SPOUSE TO TAKE AGAINST WILL.

COUNSEL APPEARED AS FOLLOWS:

ROLAND J. CHRISTY, ESQ., for Harry Conrad Myers, Chloe Myers, Robert A. Kolb, and Francis A. Weckenman, petitioners;

WALTER PHIPPS, JR., ESQ., for Abel K. Harris, respondent.

TAXIS, *P. J.*

This matter comes before the court on a petition to strike off the election of a surviving husband which, in turn, involves the validity of an ante-nuptial agreement signed by the decedent, Ida Myers Harris, and her surviving spouse, Abel K. Harris, on April 21, 1959, eighteen days before their marriage on May 9, 1959. At the time of their marriage, Mr. Harris, then seventy-six years of age, and Mrs. Harris, sixty-six years of age, each had an adult child from a prior marriage. By the terms of the agreement they renounced their respective interests in the estate of the other. There

was no provision in the agreement in favor of the wife or the husband, nor for the husband in the wife's will. The parties lived together in marital harmony from the date of their marriage until the wife's death on September 20, 1966.

On October 21, 1966, the husband filed his election to take against the will, and the executors then filed the present petition to vacate the election. A hearing was held at which the validity of the ante-nuptial agreement was the sole issue. The matter has been argued at length, written briefs have been submitted, and the question is before us for decision.

The rule announced in all the cases is that ante-nuptial agreements are presumptively valid, yet they require, either (1) a reasonable provision made for the wife, or, in the absence of such provision, (2) a full and fair disclosure to the wife of the husband's worth. *Kaufmann Est.*, 404 Pa. 131, 136; *Gelb Est.*, 425 Pa. 117.

The present is the converse of the usual case, in that here the wife is the decedent and the claimant is the surviving husband. We think we need spend little time in consideration of this preliminary question, whether the "reasonable provision" requirement works both ways, i.e., where the wife is the decedent, does the surviving husband have the right to elect to claim his share under the Intestate Act on the ground that there was a failure of full and fair disclosure? Cf. *McCready's Est.*, 316 Pa. 246.

The husband's evidence establishes that three weeks before their marriage he and his intended wife, now the decedent, called upon Malcolm Campbell, Esq., who was then and for several years prior thereto, had been the husband's counsel, for the purpose of having Mr. Campbell prepare an ante-nuptial agreement. Prior to that meeting Mr. Campbell had not known the intended wife. Some time prior to that first meeting with Mr. Campbell, the intended wife had called upon her own attorney, Roland J. Christy, Esq., and had had Mr. Christy prepare and send to her a draft of an

ante-nuptial agreement which had an accompanying schedule of her personal and real estate holdings, with the exception of her cash in bank. She brought a copy of this draft with her to the first meeting in Mr. Campbell's office, and it was found among her papers in her home after her death and was delivered, without any schedule of assets attached to her daughter-in-law by the husband's son. It is marked exhibit "B" attached to the stenographer's notes of testimony.

A part of Mr. Campbell's testimony as to what occurred at that first meeting at which he examined the draft of the agreement drawn by Mr. Christy, is as follows:

> "And, I checked out certain information as to their names and where they lived . . . I knew then that Abel [his client and the intended husband] was around seventy-five or seventy-six. I was quite sure, but I did ask him whether he was retired and I asked her and she said she wasn't working. I asked them whether—what the circumstances were, and they both said that it was a second marriage for both of them. And I asked them what children they had, . . . they each told me they had one child by, of course, the prior marriages. And, I asked Abel—even though I knew he owned this property in Plymouth Township—I asked him roughly, what he was worth. That's important. And, he said, well, he had the house plus about seven or eight thousand dollars in a savings account.
>
> "And then I asked Mrs. Myers . . . and she said she owned a piece of real estate, and I asked her whether she had any other assets, and she didn't give any answer. And I said that even though it isn't legally necessary, I think it's better to have a list of what each of them owned. But I never met the woman before and I didn't press the matter."

Under the Dead Man's Rule the estate objected to Mr. Campbell's appearance as a witness for the surviving husband, but we think the precise question, after having been fully discussed, has been decided to the contrary in *Gelb Est.*, 425 Pa. 117, wherein the Supreme Court ruled that a scrivener's testimony is admissible and that he is a competent witness. We so hold as to the admissibility of Mr. Campbell's testimony.

When the intended husband and wife met for the second time in Mr. Campbell's office, the present antenuptial agreement had been prepared by Mr. Campbell and was thereupon executed by the parties. It contained no schedule of assets of either of the parties, nor was a schedule subsequently prepared or appended. Except for this possible difference, the only significant omission from the present agreement is that contained in the draft prepared by Mr. Christy for the decedent in paragraph THIRD wherein each of the parties waives "the right to have this agreement nullified in whole or in part for or by reason of lack of knowledge, at the time of the signing, of the full measure and value of the estate of the other."

As to what further occurred on April 21, 1959, at the second meeting in Mr. Campbell's office when the present agreement was executed, Mr. Campbell testified that he read the agreement to the parties and "I again mentioned that I think it would be better if there was some kind of list attached but I said—I told them that if they don't want it attached at least we should have some idea of what was what and I asked Abel Harris what his total assets were including the real estate and he said twenty thousand dollars, and I looked at her and I said 'Mrs. Myers, can you give me some idea?' and she said 'About twice that much.' I didn't press the point on that and they executed the agreement."

At the hearing, the parties stipulated that the assets of Mrs. Harris at the date of the ante-nuptial agreement amounted to $101,182, plus a 5-acre farm known as 780 Jolly Road, Whitpain Township, value unknown as of April 21, 1959.

The ante-nuptial agreement was admitted into evidence and thereupon the petitioner rested.

Mr. Campbell testified that he represented Abel Harris, the husband, in 1955 or 1956, and be continued to represent him until February 9, 1967, a week before the hearing of the matter now before the court. On that date, February 9, 1967, Mr. Campbell withdrew his appearance of Mr. Harris and was succeeded as counsel by Mr. Phipps. However, Mr. Campbell did actively represent Mr. Harris at the hearing of December 14, 1966, upon the appeal to this court from the decision of the Register of Wills dismissing the formal caveat to the wife's will.

Mr. Campbell does not tell us why, prior to the execution of the agreement, he made no further inquiry of the intended wife as to the value of her assets if, as he testified, he was aware of the importance of such information to complete the agreement properly. It would seem that he might have obtained the information without too much effort by explaining to the intended wife the importance of it or by verifying with her former counsel, Mr. Christy, with whom he was well acquainted as a fellow member of our bar, a relatively accurate figure representing her total estate. The copy of the ante-nuptial agreement which Mr. Christy had prepared and which was exhibited by the intended wife to Mr. Campbell at their first meeting, was enfolded in Mr. Christy's backer containing his name and address. Mr. Campbell's failure to follow this more obvious course has precipitated this controversy. Nevertheless, it is not necessary that the husband have *exact knowledge* as to the worth of the wife's property. *Holwig's*

Est., 348 Pa. 71. And, an intended husband, knowing what he is doing, who freely executes an ante-nuptial agreement which declares that he has full knowledge of the property and estate of his spouse cannot, in the absence of fraud or overreaching, repudiate his agreement after her death and claim that which by the agreement he declares he would not claim. Cf. *McCready's Est.*, 216 Pa. 71, 74, 75. It is significant that the surviving husband makes no claim that he did not understand the import of the agreement. Nowhere does he state that he was deceived thereby. There is, therefore, a presumption that there was no concealment from nor imposition upon him by reason of his execution of the agreement. The court thinks, also, that it is only reasonable to assume that when the agreement in question was executed in Mr. Campbell's office, Mr. Campbell, his counsel, was satisfied that there had been a full enough disclosure by the wife to make the agreement a valid one.

But to return to Mr. Campbell's testimony. On cross-examination he conceded that he prepared and filed for Mr. Harris an election to take against the will, and that on October 20, 1966, he entered into a contingent fee agreement with Mr. Harris which provides in part: "I, Abel K. Harris, hereby retain and engage Malcolm Campbell, Esq., as attorney to represent me in proceedings before the Register of Wills and the Orphans' Court of Montgomery County, Pennsylvania, in filing and sustaining my election to take against the will of my late wife, Ida Myers Harris, or any will that might be probated on her behalf under the following conditions: . . ."

Mr. Campbell had prepared wills for Mr. and Mrs. Harris which they executed on June 5, 1959, less than a month after they were married, at which time Mr. Campbell says he considered that he was attorney for both husband and wife, and he also advised Mrs. Harris concerning

her 1958 income tax return which he had reviewed sometime between the time of the marriage and June 12, 1959. A 1958 U. S. income tax return sets forth her income of $3,499.13, and with this information, Mr. Campbell testified that he would have been able to approximate the size of her stock holdings and savings account. If Mr. Campbell had any misgiving after the now alleged intentional nondisclosure by the wife, it would seem that he had a duty to so inform Mrs. Harris, who by that time, he says, also had become his client.

On April 4, 1964, Mrs. Harris, the decedent, made an inquiry by letter to Mr. Campbell relating to the ante-nuptial agreement, and he responded by a letter dated April 10, 1964, which said, *inter alia*: "Your agreement is a pre-nuptial agreement and specifically sets forth your rights in regard to wills, intestacy and claims in the event of death of the other." Again, with the knowledge of Mrs. Harris' assets gained by Mr. Campbell in representing her in various matters, he again had an opportunity and, indeed, a duty to call this alleged defect in the agreement to her attention. His failure to do so would indicate to the court that he considered the ante-nuptial agreement valid and binding. The record also establishes that Abel K. Harris and the decedent filed joint U. S. Income tax returns for the years 1959 through 1965, which set forth in detail the income of both parties, including the investment securities owned by Mrs. Harris and the amount of income received each year upon each investment asset. Under the husband's own evidence it appears that the ante-nuptial agreement was prepared by his attorney. In such case its intendments must be construed against the husband where, as here, the wife was not represented by counsel. Cf. *McClellan Est.*, 365 Pa. 401; *Barnhart v. Barnhart*, 376 Pa. 44.

The ante-nuptial agreement having been admitted into evidence, is presumptively valid, and the burden of proving

its invalidity rests upon the surviving husband who has attempted to set it aside. *Kaufmann Est.*, 404 Pa. 131, 136. This substantial burden was further increased by the testimony of a partner and an employee of the investment brokerage firm in Philadelphia which handled the decedent's investments prior to and during the years of her marriage to Mr. Harris and who prepared her and his joint federal income tax return for the years the Harrises were married. These witnesses testified that the husband signed the tax returns without ever having made any inquiry or without having shown any interest or made any inquiry as to the extent of his wife's property, and that the joint returns combined schedules of the income received by the decedent upon her investments and the names of the corporations paying the income to her."

After careful consideration of the foregoing and of all the other evidence presented and the able arguments of counsel, the court finds that the estate has clearly established that the ante-nuptial agreement was fair, equitable and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death. Therefore, the court concludes that it operates as a bar to the husband's right to elect to take against the will, and that he has no standing as a caveator to the will. His election, therefore, is stricken off and the will offered for probate to the Register of Wills is hereby directed to be probated as the last will and testament of the decedent.

By THE COURT

ALFRED L. TAXIS, JR.,
President Judge.

Dated: June 28, 1967.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 810

HARRY CONRAD MYERS and CHLOE MYERS individually and as parents and natural guardians for CATHARINE ANNE MYERS, and ROBERT A. KOLB and FRANCIS A. WECKENMAN as executors and trustees of the will of IDA MYERS HARRIS, Deceased,

Petitioners,

v.

ABEL K. HARRIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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COUNTERSTATEMENT OF CASE.

Petitioners' statement that the trial court did not believe the witness Campbell is not supported by the record. On the contrary, the trial judge in reporting the factual background of the case and what the husband's evidence established quoted verbatim Campbell's relevant testimony regarding the misrepresentations (Appendix B to Petition, pp. 18, 19). Petitioners' quotation from the lower court's opinion allegedly showing that the trial judge did not believe Campbell is taken out of context and is merely part of the court's final summary conclusion after reasoning from all of the evidence, certain principles of law and the arguments of counsel (Appendix B to Petition, p. 24).

The trial judge's findings were never confirmed by the Orphans' Court en banc.

In their "Counterstatement of Questions Involved" in their brief before the Pennsylvania Supreme Court, petitioners listed only the following questions:

> "1. May the attorney for the intending husband who draws an antenuptial agreement and supervises the execution thereof, upon the death of the wife, enter into a contingent fee agreement with the surviving husband to set aside the agreement?
>
> 2. In such case may said attorney on the eve of the trial withdraw as attorney of the surviving husband thereby become competent to testify?
>
> 3. May the intending husband whose attorney prepared an antenuptial agreement which recited that the nature and extent of the holdings of real and personal property of each was disclosed to the other, after the wife's death elect against her will when there is no fraud or overreaching?"

Petitioners first raised the question of deprivation of due process under the Fourteenth Amendment in the Supreme Court of Pennsylvania in their Petition for Reargument which was denied without opinion.

ARGUMENT IN OPPOSITION.

Point I.

The Constitutional Question Was Not Properly Presented For Decision in the Supreme Court of Pennsylvania.

The first mention of the federal constitution in this case in the Supreme Court of Pennsylvania was in petitioner's Petition for Reargument.

In their "Counterstatement of Questions Involved" in their brief before the Pennsylvania Supreme Court, petitioners listed only the following questions:

> "1. May the attorney for the intending husband who draws an antenuptial agreement and supervises the execution thereof, upon the death of the wife, enter into a contingent fee agreement with the surviving husband to set aside said agreement?
>
> 2. In such case may said attorney on the eve of the trial withdraw as attorney for the surviving husband and thereby become competent to testify?
>
> 3. May the intending husband whose attorney prepared an antenuptial agreement which recited that the nature and extent of the holdings of real and personal property of each was disclosed to the other, after the wife's death elect against her will when there is no fraud or overreaching?"

In their Petition for Reargument petitioners, without explanation or attempt to show the application of the hereinafter stated constitutional provision to the case at hand, gratuitously inserted the following paragraph:

> "Section 1 of Amendment XIV to the Constitution of the United States provides, inter alia, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws'."

The Supreme Court of Pennsylvania dismissed the Petition for Reargument without an opinion. It is well settled that the Supreme Court of the United States will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the State Court for a re-hearing where the petition is denied without more. *Citizen's National Bank v. Durr,* 257 U. S. 99, 106.

Point II.

No Substantial Federal Question Is Involved in This Proceeding.

A. Petitioners Predicate Their Claim of Denial of Due Process Upon the False Premise That the Appellate Court Made an Independent Finding of a Basic Fact Contrary to the Trial Judge.

Petitioners predicate their entire claim of deprivation of due process solely upon the construction which they would place upon the opinion of the trial court as opposed to the construction placed thereon by the appellate court. The appellate court did not substitute its finding of fact regarding misrepresentations for that of the trial judge. On the contrary, the appellate court properly construed

the opinion of the trial court as having found that the misrepresentations had been made. The essential question here presented to your Honorable Court is whether the appellate court properly interpreted the effect of the decision of its lower court. "It is elementary and needs no citation of authority to show that due process clause of Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character." *McDonald v. Oregon, etc. Nav. Co.,* 233 U. S. 665. The Constitution does not guarantee that the decisions of state courts shall be free from error, or require that its pronouncements shall be consistent. *Worcester County Trust Co. v. Riley,* 302 U. S. 292.

Nonetheless, the appellate court did reasonably and properly interpret the lower court's opinion. The fair reading of the trial judge's entire opinion indicates that he did, in fact, find that the misrepresentations regarding the wife's assets were made. In his opinion (Appendix B to Petition, p. 18) the trial judge states, "The husband's evidence establishes . . ." and then goes on to recite certain facts and to quote the witness Campbell's testimony (Appendix B to Petition, p. 19) regarding his interrogation of the parties concerning their assets. On page 20 the trial judge states, *"As to what further occurred on April 21, 1959, at the second meeting in Mr. Campbell's office when the present agreement was executed,* Mr. Campbell testified that he read the agreement to the parties and 'I again mentioned that I think it would be better if there was some kind of list attached but I said—I told them that if they don't want it attached at least we should have some idea of what was what and I asked Abel Harris what his total

assets were including the real estate and he said twenty thousand dollars, and I looked at her and I said, "Mrs. Myers, can you give me some idea?" and she said, "About twice that much." I didn't press the point on that and they executed the agreement'." On page 23, the trial judge, continuing his narration of the established facts, states, "The record *also establishes* . . ." On page 24, the trial judge, in finding as a fact favorable to petitioners that the husband never showed any interest or made any inquiry regarding his wife's assets while their joint income tax returns were being prepared, used the very same phrase which he used regarding Campbell's evidence, to wit, "These witnesses *testified that* . . ."

The petitioners' argument that the trial judge expressly and specifically disbelieved the witness Campbell and that the appellate court substituted its assessment of the witness's credibility for that of the hearing judge and found a basic fact opposite to that of the hearing judge is not supported by the facts and is not presented to your Honorable Court by the record in this case. The trial court never passed upon the credibility of the witness Campbell. No such principle of law is established by the decision of the Pennsylvania Supreme Court. The appellate court in writing its decision obviously abstracted the relevant facts from the lower court's opinion even to the extent of using the word "testified" in exactly the same context that the trial judge used it when discussing evidence regarding misrepresentations. The trial court's opinion (Appendix B to Petition, pp. 18, 19, 20) reciting what the husband's evidence established quoted verbatim the testimony of the witness Campbell on the subject of the misrepresentations. What point would there have been for the trial court to quote this testimony if it did not believe it? Nowhere does the trial court say that it did not

believe this testimony. Nowhere does the trial court say that the witness was not credible or that the misrepresentations were not made. Nowhere does the appellate court state that it is making an independent finding of fact. The Supreme Court of Pennsylvania was justified in construing the opinion of the trial judge to have found that the misrepresentations were made by the decedent wife. The United States Supreme Court will not review decisions of state courts which rest upon adequate non-federal grounds. *Young v. Ragan*, 337 U. S. 235. The construction or interpretation placed by an appellate court upon an opinion of a lower state court in this context does not raise a substantial federal question.

B. No Denial of Due Process Is Involved in an Appellate Court Reviewing Conclusions of Ultimate Fact or of Law Drawn by One of Its Subordinate Trial Courts.

No novel principle of law in Pennsylvania is established by the decision in this case. No right guaranteed by the Federal Constitution has been violated. The petitioners mistakenly contend that the trial court's summary statement near the end of his opinion (Appendix B to Petition, p. 24), to wit, "*After careful consideration of the foregoing and of all the other evidence presented and the able arguments of counsel, the court finds that the estate has clearly established that the antenuptial agreement was fair, equitable and reasonable in view of all the surrounding circumstances, that it was entered into voluntarily and with fair and adequate knowledge of the facts, and in the utmost good faith on the part of the decedent and that it was valid and subsisting on the date of her death.*", is an unchallengable, unreviewable, irreversible and constitutionally sanctified finding of fact. It has long been the

law in Pennsylvania that a chancellor's conclusions, whether of law or of ultimate fact, are no more than his reasoning from the underlying facts and are reviewable. Where the decision or determination of a case depends upon the inferences and deductions which are to be drawn from the facts, an appellate court may deduce these for itself whatever may have been the findings below. *Jac's Estate,* 355 Pa. 137, 143. Where a finding of fact is simply a deduction from other facts reported by the tribunal under review, and the ultimate fact in question is purely the result of reasoning, the appellate court is competent to judge its correctness and will draw its own conclusions from the facts as reported. *Dorrance Estate,* 309 Pa. 151, *cert. denied,* 287 U. S. 660. No greater weight is given by an appellate court to such findings than to findings of law. *Fidelity Trust Co. v. Union National Bank,* 313 Pa. 467, *cert. denied,* 291 U. S. 680. The trial court arrived at the aforementioned summary conclusion by the process of reasoning after considering several circumstances and principles of law which it apparently believed mitigated the effect of the misrepresentations. It is significant, for example, that the trial court concluded that the agreement was entered into with fair and *adequate* knowledge of the facts. The trial court did not say the agreement was entered into with *full* knowledge of the facts. The lower court's conclusion that the knowledge of the facts was *adequate* may well have been predicated upon its statement (Appendix B to Petition, p. 21) of the principle of law to the effect that "It is not necessary that the husband have *exact* knowledge as to the worth of the wife's property". The trial court may well have reasoned that the lack of full disclosure was cured by the other circumstances and principles of law discussed in its opinion.

C. No Denial of Due Process Is Involved in an Appellate Court Making an Independent Finding of Fact.

Although the appellate court did not make an independent finding of fact, petitioners' argument that it would be violative of due process for an appellate court to do so is without merit. There is no constitutional proscription against an appellate court making a finding of fact in a non-jury civil case. The three federal cases cited by petitioners in their brief (Renault, Sieracinski & Kawietzke, Petition, p. 8) are all jury cases and not applicable here. Nor is this a novel procedure in Pennsylvania. It is well settled and long established in Pennsylvania that on appeal from a trial of an action at law without a jury, the appellate court may consider elements not considered below and make its own findings. *General Contract Purchase v. Bitomski*, 102 Pa. Super. Ct. 266, 156 A. 727 (1936); *Re McCann*, 104 Pa. Super. Ct. 196, 159 A. 334 (1931); *Innes v. Nanticoke City School District*, 342 Pa. 433, 20 A. 2d 225 (1941); *Commercial M Co. etc. v. Waters*, 280 Pa. 177, 180 (1924). Also, the findings of the trial judge in the instant case were not confirmed by the Orphans' Court en banc and are therefore entitled to less weight than they otherwise would have been. *Appeal of Rogers*, 361 Pa. 51; 62 A. 2d 900.

D. The Opinion of the Appellate Court Does Not Establish Any New Principle of the Law of Evidence, or Reaffirm Any Previously Existing Principle or Rule Repugnant to the Constitution.

The holding in this case by the Supreme Court of Pennsylvania does not, as petitioners contend, establish or reduce the quantum or quality of proof required to estab-

lish a fact or to shift the burden of going forward with the evidence upon the other side. The principle or rule of law, *that once misrepresentations have been proved* by the person attacking the antenuptial agreement, it will be presumed that the contract was entered into in reliance upon these misrepresentations and the burden to prove otherwise is upon the decedent's estate, as set forth in the opinion, is not new in Pennsylvania or an unreasonable procedural rule. It was enunciated as early as 1950 in *McClellan's Estate,* 365 Pa. 401, 75 A. 2d 595, and antedates the agreement in the case sub judice. This principle is not repugnant to the controlling rules and decisions of the United States Supreme Court or the Constitution.

In the case at hand the petitioners were given a full hearing before a court of competent jurisdiction, had the opportunity to cross-examine witnesses, to present evidence, and were not denied any constitutionally protected right. There was no deprivation of due process.

CONCLUSION.

Petitioners have not alleged or shown any manner in which the litigation was determined which was repugnant to the controlling rules and decisions of your Honorable Court or the Constitution, and no substantial federal question is involved. Therefore, your Honorable Court should deny certiorari.

Respectfully submitted,

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